IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs April 20, 2004

STATE OF TENNESSEE v. JOHN TYREE LYTLE

Direct Appeal from the Criminal Court for Sullivan County
No. S46, 413 Phyllis H. Miller, Judge

No. E2003-01119-CCA-R3-CD
May 3, 2004

The defendant pled guilty to simple possession of marijuana and possession of drug paraphernalia and was thereafter convicted by a Sullivan County jury of attempted possession of over 0.5 grams of cocaine with intent to sell or deliver. The defendant was sentenced to six years for the cocaine conviction and eleven months and twenty-nine days for the two misdemeanors. The defendant's misdemeanor sentences were ordered to run concurrently with each other but consecutively to the six-year sentence, for an effective sentence of six years, eleven months and twenty-nine days. On appeal, the defendant raises the following issues: (1) whether the defendant was denied the right to a speedy trial; (2) whether the trial court erred in overruling the defendant's motion to suppress evidence resulting from an unlawful search and seizure; (3) whether the trial court erred in overruling the defendant's motion to suppress statements made by the defendant in violation of his *Miranda* rights; (4) whether the jury verdict lacked unanimity; (5) whether the evidence was sufficient to support the conviction; and (6) whether the trial court erred in sentencing the defendant. We affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed

JOE G. RILEY, J., delivered the opinion of the court, in which DAVID H. WELLES and THOMAS T. WOODALL, JJ., joined.

David N. Darnell, Kingsport, Tennessee (on appeal and elbow counsel at trial); and John Tyree Lytle, Blountville, Tennessee, *Pro Se* (at trial), for the appellant, John Tyree Lytle.

Paul G. Summers, Attorney General and Reporter; Brent C. Cherry, Assistant Attorney General; H. Greeley Wells, Jr., District Attorney General; Barry P. Staubus, Deputy District Attorney General; and Joseph Eugene Perrin, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. PROOF AT TRIAL

Officer Hank McQueen of the Kingsport Police Department testified that shortly after midnight on January 21, 2002, he investigated a robbery in Kingsport, Tennessee. Officers McQueen

and John Berry were directed to the apartment of the suspect, knocked on the door, and identified themselves as police officers. After a delay of several minutes, the door was ultimately opened by Kay Moore, who matched the description of the robbery suspect. The officers asked permission to enter the residence; Moore consented. Upon entering the apartment, the officers noticed a strong odor of marijuana. In addition to Moore, two women were seated in the front room. The officers requested and received permission to conduct a safety sweep of the apartment. They encountered a closed door; Officer Berry opened it, revealing the defendant seated on a toilet. Officer McQueen testified the defendant was seated with his "pants down but his underwear up." The officer told the defendant to join the others in the front room, at which time Officer McQueen noticed a pack of rolling papers on the edge of the sink directly in front of the toilet. Officer McQueen described the bathroom as "very small . . . when you're sitting on the toilet, I would say your shoulder would almost touch the sink." As soon as the defendant left the bathroom, Officer McQueen entered it to retrieve the rolling papers. He then noticed a small plastic bag containing what appeared to be marijuana and loose marijuana floating in the toilet. A pat-down search of the defendant revealed two additional plastic "baggies" of marijuana.

Officer McQueen returned to the bathroom to retrieve the marijuana floating in the toilet and noticed a white grocery bag lying on the floor nearby. Officer McQueen observed that the bag contained drug paraphernalia, including used rolling papers and corners of plastic baggies. Officer McQueen testified the "corner bags" are commonly used in the sale of cocaine. Additionally, Officer McQueen observed what appeared to be part of a plastic bag "stuck in the wall" next to the sink approximately two and a half feet from the commode. Officer McQueen removed the bag and discovered "one big ball" of what appeared to be cocaine. When Officer McQueen showed the bag and its contents to the defendant, the defendant stated, "It isn't mine."

At the time of his arrest, the defendant identified himself as "Janwan Johnson," a fictitious name, and provided the officers with a fictitious address in Ohio. The defendant told Officer McQueen that his reason for being in Kingsport was "to sell [cocaine] for some boys up north." Officer McQueen testified the defendant asked him to "make a deal" or "help him out" by letting the defendant set up a drug purchase. The defendant offered to wear a concealed wire recording device for the police. Officer McQueen told the defendant that he was not personally able to make these arrangements and requested the presence of vice officers at the scene.

Detective Rusty Wallace of the Kingsport Police Department testified he was summoned to the apartment by Officer McQueen to speak with the defendant concerning his desire to work for the police. The defendant told Detective Wallace he could purchase an ounce of cocaine. Detective Wallace took the defendant to the police department for processing and to discuss the possibility of the defendant working for the police. After booking at the police station, the defendant was apprised of, and waived, his *Miranda* rights.

The defendant was again apprised of his constitutional rights in the early afternoon. Detective Wallace and another officer conducted a formal interview of the defendant, during which the defendant stated he came to Kingsport, Tennessee, for the purpose of selling drugs. The defendant stated he sold cocaine out of his house in Kingsport and could "sell it everywhere." The defendant told the officers he could obtain both crack and powder cocaine.

David Holloway, a forensic chemist with the Tennessee Bureau of Investigation, testified that analysis of the white powder found in the bathroom weighed three grams and contained cocaine.

Although the defendant was charged with possession of over 0.5 grams of cocaine with intent to sell or deliver, the jury convicted him of the lesser-included offense of attempted possession of over 0.5 grams of cocaine with intent to sell or deliver.

II. SPEEDY TRIAL

The defendant contends his right to a speedy trial was violated and alleges he was arrested on January 21, 2002, and not tried until February 25, 2003. The record reflects the defendant filed a motion on October 31, 2002, requesting a speedy trial. He did not move to dismiss the presentment for failure to provide a speedy trial. The record does not reveal the filing of a subsequent motion to dismiss. The defendant has not cited to any portion of the technical record or the transcripts where the trial court was asked at any time to dismiss the presentment based upon the denial of the right to a speedy trial. This issue is, therefore, waived. *See* State v. Thomas E. Davenport and John Simmons, No. M2000-00317-CCA-R3-CD, 2000 Tenn. Crim. App. LEXIS 903, at **7-8 (Tenn. Crim. App. Nov. 17, 2000) (holding the failure to file a motion to dismiss waives the issue for appellate review, and the filing of a mere demand for speedy trial does not suffice), *perm. to app. denied* (Tenn. 2001); *but cf.* State v. Thomas Dee Huskey, No. E1999-00438-CCA-R3-CD, 2002 Tenn. Crim. App. LEXIS 550, at *88 (Tenn. Crim. App. June 28, 2002),[1] *perm. to app. denied* (Tenn. 2003); Tenn. Ct. Crim. App. R. 10(b); Tenn. R. App. P. 24(b), 36(a). We have, nevertheless, examined the record for plain error. *See* Tenn. R. Crim. P. 52(b). Specifically, we have examined the factors set forth in Barker v. Wingo, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972), and State v. Wood, 924 S.W.2d 342, 346 (Tenn. 1996); namely, (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right to a speedy trial; and (4) any resulting prejudice. As a result of our examination, we discern no plain error. Thus, the defendant is not entitled to relief.

III. WAIVER IN ABSENCE OF MOTION FOR NEW TRIAL

The defendant contends: (1) the trial court erred in denying his motion to suppress evidence based upon an unlawful search and seizure; (2) the trial court erred in failing to exclude his statements to law enforcement officers due to the absence of *Miranda* warnings; and (3) there was a lack of unanimity in the jury verdict because the presentment improperly charged "possess[ion] with intent to sell or deliver" in a single count of the presentment (emphasis added).

The defendant did not file a motion for new trial. Thus, these issues are waived. *See* Tenn. R. App. P. 3(e); State v. Walker, 910 S.W.2d 381, 386 (Tenn. 1995). Nevertheless, we have examined the record in order to ascertain whether there is plain error with regard to these issues. *See* Tenn. R. Crim. P. 52(b). Without elaboration as to the search and seizure and *Miranda* issues,

[1] To the extent that Thomas Dee Huskey suggests that there can never be an appellate waiver of a speedy trial issue, we disagree with such a suggestion.

suffice it to say we find no plain error. As to the unanimity issue, we note the defendant was not charged with the delivery or sale of cocaine, delivery and sale being listed in two separate subparts of the statute. *See* Tenn. Code Ann. § 39-17-417(a)(2), (3); *see also* State v. Angela E. Isabell, No. M2002-00584-CCA-R3-CD, 2003 Tenn. Crim. App. LEXIS 558, at **7-8 (Tenn. Crim. App. June 27, 2003) (indicating an indictment or presentment should not charge both delivery and sale in the same count); *but cf.* State v. Porter, 2 S.W.3d 190, 191 (Tenn. 1999) (noting the legislature's intent to "punish delivering . . . a controlled substance in the same manner and as the same crime as selling a controlled substance"). Instead, the defendant was charged only as to subpart (4), which includes possession with intent to either "deliver or sell[.]" *See* Tenn. Code Ann. § 39-17-417(a)(4). We discern no plain error as to this issue.

Accordingly, these three issues are waived, and we find no plain error. As to the two remaining issues of sufficiency of the evidence and sentencing, we may address both even in the absence of a motion for new trial. *See* State v. Boxley, 76 S.W.3d 381, 390 (Tenn. Crim. App. 2001).

IV. SUFFICIENCY OF THE EVIDENCE

The defendant contends the evidence is insufficient to support his conviction for attempted possession of over 0.5 grams of cocaine with intent to sell or deliver. Specifically, the defendant contends that the mere presence of cocaine in the area of the defendant is insufficient to prove he exercised the requisite control over the contraband to support attempted possession. This contention lacks merit.

A. Standard of Review

When an appellant challenges the sufficiency of the evidence, the standard of review is whether, after viewing the evidence in the light most favorable to the state, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979); State v. Evans, 838 S.W.2d 185, 190-91 (Tenn. 1992); Tenn. R. App. P. 13(e). On appeal, the state is entitled to the strongest legitimate view of the evidence and all reasonable or legitimate inferences which may be drawn therefrom. State v. Elkins, 102 S.W.3d 578, 581 (Tenn. 2003). This court will not reweigh the evidence, reevaluate the evidence, or substitute its evidentiary inferences for those reached by the jury. State v. Carey, 914 S.W.2d 93, 95 (Tenn. Crim. App. 1995). Furthermore, in a criminal trial, great weight is given to the result reached by the jury. State v. Johnson, 910 S.W.2d 897, 899 (Tenn. Crim. App. 1995).

Once approved by the trial court, a jury verdict accredits the witnesses presented by the state and resolves all conflicts in favor of the state. State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983). The credibility of witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the proof are matters entrusted exclusively to the jury as trier of fact. State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Brewer, 932 S.W.2d 1, 19 (Tenn. Crim. App. 1996). A jury's guilty verdict removes the presumption of innocence enjoyed by the defendant at trial and raises a presumption of guilt. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). The defendant then bears the burden of overcoming this presumption of guilt on appeal. State v. Black, 815 S.W.2d 166, 175 (Tenn. 1991).

B. Analysis

It is an offense to knowingly possess or attempt to possess a controlled substance with intent to manufacture, deliver, or sell. Tenn. Code Ann. §§ 39-12-101, -17-417(a)(4). "Possession" may be actual or constructive. State v. Shaw, 37 S.W.3d 900, 903 (Tenn. 2001). To prove constructive possession, the state must establish the defendant had the power and intention at a given time to exercise dominion and control over the drugs either directly or through others. *Id*. at 903; State v. Patterson, 966 S.W.2d 435, 445 (Tenn. Crim. App. 1997). Presence in the area of the drugs or association with those possessing drugs is not alone sufficient to establish constructive possession. State v. Cooper, 736 S.W.2d 125, 129 (Tenn. Crim. App. 1987).

The evidence adduced at trial indicates Kingsport police officers found a bag containing 3.0 grams of cocaine within arms reach of the defendant. Officers testified that a bag discovered on the floor immediately next to where the defendant was seated contained, among other paraphernalia, cut corners of plastic baggies. The officer testified that corners of baggies are customarily used in the sale of cocaine. Furthermore, the defendant stated to the police that his purpose in being in Kingsport was to sell cocaine. In our view, had the jury convicted the defendant of possession of over 0.5 grams of cocaine with intent to sell or deliver, the evidence would have supported such a verdict. Furthermore, "[i]t is no defense to prosecution for criminal attempt that the offense attempted was actually committed." Tenn. Code Ann. § 39-12-101(c). We conclude a rational trier of fact could find the defendant guilty of the convicted offense based upon the evidence.

V. SENTENCING

The defendant argues the trial court abused its discretion in imposing the maximum six-year sentence as a Range I standard offender for attempted possession of over 0.5 grams of cocaine with intent to sell or deliver. He contends the trial court failed to properly weigh enhancement and mitigating factors, erred in ordering consecutive sentences, and erred in denying alternative sentencing. We disagree.

A. Standard of Review

An appellate court's review of a challenged sentence is *de novo* on the record with a presumption the trial court's determinations are correct. Tenn. Code Ann. § 40-35-401(d). The Sentencing Commission Comments to this section of the statute indicate the defendant bears the burden of establishing the sentence is improper. When the trial court follows the statutory sentencing procedure and gives due consideration and proper weight to the factors and principles relevant to sentencing, this court may not disturb the sentence. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

B. Enhancement and Mitigating Factors

The weight given to each enhancement or mitigating factor is within the discretion of the trial court, assuming the trial court has complied with the purposes and principles of the sentencing act and its findings are supported by the record. State v. Madden, 99 S.W.3d 127, 138 (Tenn. Crim.

App. 2002). The statutes prescribe no particular weight for an enhancement or mitigating factor. State v. Gosnell, 62 S.W.3d 740, 750 (Tenn. Crim. App. 2001).

The presumptive sentence as a Range I standard offender for attempted possession of over 0.5 grams of cocaine with intent to sell or deliver is three years. *See* Tenn. Code Ann. § 40-35-112(a)(3). The trial court made explicit findings with respect to the enhancement and mitigating factors it applied in arriving at the defendant's sentence. The trial court enhanced the defendant's sentence to the maximum, six years, based upon finding the following enhancement factors: (2), "a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range"; (9), "the defendant has a previous history of unwillingness to comply with the conditions of a sentence involving release in the community"; and (14), "the felony was committed while [the defendant was] on any of the following forms of release status if such release is from a prior felony conviction: . . . parole[.]" *See id.* § 40-35-114(2), (9), (14)(B) (2003). The court applied mitigating factor (9), "[t]he defendant assisted the authorities in uncovering offenses committed by other persons[.]" *See id.* § 40-35-113(9). The trial court then determined the enhancement factors outweighed the mitigating factor and imposed a six-year sentence.

The record establishes that the defendant had prior convictions in Ohio for felonious assault and escape. He had two prior parole revocations and was on parole when the instant felony offense was committed. Thus, the trial court properly applied enhancement factors (2), (9), and (14). *See id.* § 40-35-114(2), (9), (14) (2003). The defendant complains the trial court should have applied mitigating factor (1), that his "criminal conduct neither caused nor threatened serious bodily injury." *See id.* § 40-35-113(1). He also complains the trial court inappropriately weighed the factors. We discern no abuse of discretion in weighing these factors and further conclude the six-year sentence is justified even if mitigating factor (1) is applied.

C. Consecutive Sentencing

Generally, it is within the discretion of the trial court to impose consecutive sentences if it finds by a preponderance of the evidence that at least one of following statutory criteria apply:

> (1) [t]he defendant is a professional criminal who has knowingly devoted such defendant's life to criminal acts as a major source of livelihood;
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> . . .
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> (4) [t]he defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high;
>
> . . .

Tenn. Code Ann. § 40-35-115(b)(1), (4). The general principles of sentencing require that the length of sentence be "justly deserved in relation to the seriousness of the offense" and "be no greater than

that deserved for the offense committed." State v. Imfeld, 70 S.W.3d 698, 708 (Tenn. 2002) (citing Tenn. Code Ann. §§ 40-35-102(1) and -103(2)).

The trial court found that the defendant was a "professional criminal" and a "dangerous offender." The court further found the consecutive sentences reasonably related to the severity of the offenses and the public needed protection against the defendant's further criminal conduct.

The evidence established the thirty-three-year-old defendant came to Tennessee for the sole purpose of selling drugs. He had an extremely poor job history and no employment while in Tennessee. The trial court properly found the defendant was a professional criminal who depended upon selling illegal drugs as a major source of livelihood. *See* Tenn. Code Ann. § 40-35-115(b)(1). Regardless of whether the trial court erred in declaring the defendant a dangerous offender, the professional criminal criterion clearly justifies consecutive sentencing. *See* State v. Alder, 71 S.W.3d 299, 307 (Tenn. Crim. App. 2001) (holding only one applicable criterion is sufficient to affirm consecutive sentencing on appeal). This issue lacks merit.

D. Alternative Sentencing

Finally, the defendant contends the trial court erred in denying him an alternative sentence. Confinement is appropriate for defendants with a long history of criminal conduct and/or where less restrictive measures have been unsuccessful. *See* Tenn. Code Ann. § 40-35-103(1)(A), (C). The defendant had two prior convictions and conceded using illegal drugs for an extended period of time. The use of illegal drugs qualifies as criminal conduct regardless of whether the use resulted in a conviction. *See* State v. Bottoms, 87 S.W.3d 95, 103 (Tenn. Crim. App. 2001) (holding the use of illegal drugs, even without a conviction, may properly be considered as "criminal conduct"). He was "unsuccessfully discharged" from a drug treatment program in Ohio. He continued to use drugs thereafter. He had two prior parole revocations, yet continued to violate the law. The trial court properly denied alternative sentencing.

Based upon our review of the record, we affirm the judgments of the trial court.

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JOE G. RILEY, JUDGE